will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties."

The *High Trees'* case [1] is another instance of the application of this principle. There, the lessor was unable to recover the rent reserved and covenanted for in the lease because of a promise to accept a lower rent made without consideration and in a manner which did not in law effect a variation of the terms of the lease.

In my judgment, therefore, no enforceable right to forfeiture had arisen when these proceedings were commenced. The respondents purported to terminate this sublease by giving one month's notice in the form usually given in the case of monthly tenancies. Obviously such a notice cannot terminate a sublease for fifteen years. It follows that this sublease has not been terminated either by exercise of an enforceable right of forfeiture, or otherwise, and that therefore the respondents are not entitled to an order for possession, because section 15(3) of the Rent Control Ordinance requires that, before any order for possession can be made, the lease must have been determined according to law.

This is the position whether or not the respondents can establish facts that would bring the case within paragraph (j) of section 15(1), or, indeed, any other paragraph. It is therefore unnecessary to consider whether or not the transactions concerned were by way of subletting or by way of licence.

For these reasons, this appeal was allowed, the judgment of the High Court set aside and judgment for the appellant substituted, together with an order in her favour for costs of this appeal and of proceedings in both the High Court and the district court.

Suffian J.: I agreed with my Lord the Chief Justice that this appeal be allowed for the reasons stated by him and wish to add only this.

There was difficulty about admitting the oral evidence that the appellant had verbal permission to sublet portions of the upper floor and to give Mr. Teng a licence to occupy the ground floor because the sublease was in writing and had been registered and because of the exception in paragraph (d) of the proviso to section 94 of the Evidence Ordinance, Cap. 54, but in my view the effect of the oral evidence was not in the words of that paragraph to "rescind or modify" nor in the words of the main section to "contradict, vary, add to or subtract from" the sublease, for the verbal permission left the sublease untouched and only had the effect of waiver, waiver that is of the then landlord's right to forfeit the lease in respect of the specific breaches authorised and no other. Just as such oral evidence may be admitted to prove discharge of a liability created by a registered deed (as was pointed out in *Arivaputhira Padavachi* v. *Muthukumaraswamy Padavachi,*[3] followed 12 years later in *Jhabba Singh* v. *Chhajjoo,*[4]) so in my opinion may it be admitted to prove waiver. Also, here the appellant, having relied on the words of the then landlord that she had permission to sublet, etc., and then having acted to her detriment by doing something which might lose her the sublease, it would be unreasonable that the present landlords should be allowed to take advantage of her breach. In the words of Denning J. (as he then was) in *Robertson* v. *Minister of Pensions,*[5] it is a principle of law that "if a man gives a promise or assurance which he intends to be binding on him, and to be acted on by the person to whom it is given, then, once it is acted upon, he is bound by it."

For these reasons I allowed the appeal and agree with the order made by my Lord the Chief Justice.

Gill J.: This appeal was allowed on the ground that there had been a waiver of the lessor's right to forfeit the lease. We then stated that we would give reasons for our judgment at a later stage.

I have now seen the reasons for judgment by my Lord the Chief Justice, with which I respectfully agree and to which I do not wish to add anything.

Appeal allowed.

ROBIN & ANOR. v. GOH BOON CHOO

[F.C. (Barakbah C.J. (Malaya), Wylie C.J. (Borneo) and Tan Ah Tah F.J.) July 27, 1965]

[Singapore — Federal Court Civil Appeal No. 92 of 1964]

Contract — Conveyance of land by mortgagee — Mortgage executed under forged power of attorney — Common mistake — Total failure of consideration — Conveyancing and Law of Property Ordinance, (Cap. 243) s. 7(1)(F).

Conveyancing — Conveyance by mortgagee — Mortgage executed under forged power of attorney — Common mistake.

The appellants as mortgagees had conveyed certain property to the respondent who had successfully bid for it at an auction. It subsequently appeared that the mortgage to the appellants was executed under a forged power of attorney and the mortgage and the conveyance were set aside. The respondent thereupon brought an action to recover the purchase price and conveyancing costs. The trial judge gave judgment for the respondent as he held there had been a total failure of consideration ([1965] 1 M.L.J. 56). On appeal it was contended that (a) this was a sale by a mortgagee and therefore there was not the usual implied covenants for title and (b) under the conditions of sale, which were part of the contract, the purchaser accepted the risk that the power of attorney under which the mortgage to the appellants was executed might not be valid and subsisting.

Held: (1) this was a case of common mistake leading to impossibility of performance and notwithstanding that an indenture of conveyance had been completed, the respondent was entitled to recover;

(2) the whole basis of the transaction in this case was that the mortgage and the power of sale existed and consequently the total failure of consideration in this case was solely due to a common mistake relating to a matter that was from the outset fundamental to the contract;

(3) as the contract was impossible to perform due to common mistake and not due to default on the part of the appellants, the respondent cannot recover his conveyancing costs but can only recover the purchase price paid.

Cases referred to:—

(1) *Solle* v. *Butcher* [1950] 1 K.B. 671.

(2) *Cooper* v. *Phibbs* (1867), L.R. 2 H.L. 149.

(3) *Bingham* v. *Bingham* 1 Ves. Sen. 127; Ves. Sen. Supp. 79; 27 E.R. 934 and 28 E.R. 462.

(4) *Charter* v. *Hopkins* (1838), 4 M. & W. 399; at p. 304; 150 E.R. 1484 at p. 1487.

(5) *Svanosio* v. *McNamara* (1956), 96 C.L.R. 186.

(6) *Clare* v. *Lamb* (1875), L.R. 10 C.P. 334.

(7) *Bell* v. *Lever Brothers* [1932] A.C. 161 at p. 218.

(8) *Bree* v. *Holbech* (1781), 2 Doug. 654; 99 E.R. 415.

FEDERAL COURT.

Dato' David Marshall (*Miss Phyllis Tan* with him) for the appellants.

K. E. Hilborne for the respondent.

Cur. Adv. Vult.

Wylie C.J. (Borneo): Both the facts of this case and the course which the proceedings have taken in the High Court present some unusual features. There is no dispute as to the facts.

On 3rd May, 1960, an indenture of mortgage was executed in favour of the appellants by one Syed Abdulrahman bin Abdullah Alsagoff (to whom I shall refer as the attorney) purporting to act as attorney of one Syed Mohamed bin Salleh Alsagoff, to whom I shall refer as the owner. This mortgage secured a principal sum of $6,000 and interest. On 31st May, 1961, the appellants acting in pursuance of their power of sale under the mortgage, put up the land concerned for sale by auction. The respondent purchased the property for $6,500 and a contract of sale between the parties was executed the same day. On 30th June, 1961, the appellants as mortgagees in pursuance of this contract, executed an indenture of conveyance purporting to convey to the respondent an estate in fee simple in the land concerned.

On 22nd September, 1961, the owner as plaintiff took out a writ against the appellants and the respondent as defendants. He claimed (apparently against all defendants) a declaration that both the indenture of mortgage and the indenture of conveyance were null and void on the ground that the power of attorney under which the attorney purported to act was never executed by the owner and that the owner had never authorised the attorney to mortgage, sell, or otherwise deal with, the owner's property. He also claimed an order that the registrar of deeds, Singapore, be ordered to cancel registration and all entries relating to the mortgage and conveyance, and orders against the respondent to hand over the title deeds and account for the rents and profits.

In their separate defences, the appellants and respondent alleged that the owner had held out the attorney as competent to deal with the owner's property and was guilty of negligence or omission in failing to make known any qualification or limit on the attorney's authority. The appellants counterclaimed against the owner for such damages as the respondent might be awarded against the appellants, if the owner's claim against the respondent succeeded. In his reply, the owner alleged that the attorney, in criminal proceedings, had admitted that the alleged power of attorney was forged and that the attorney had pleaded guilty to charges under sections 471 and 467 of the Penal Code in respect of properties belonging to the owner and been sentenced to six years' imprisonment.

On 18th April, 1962, the respondent served notice on the appellants claiming to be indemnified against the owner's claim and costs of the action and for the sum of $6,500 and $187.75 conveyancing costs on the ground that —

> "the said indenture of conveyance dated the 30th June 1961 and made between yourselves of the one part and the [respondent] of the other part was null and void and of no effect and that there was a total failure of consideration for the sum of $6,500 paid by the [respondent] to yourselves as the purchase price for the said land and hereditaments known as Nos. 52 and 52A Kerbau Road, Singapore."

On 11th May, 1962, the appellants delivered a defence to the claim of the respondent contained in this notice. The substantial ground of defence was that they had sold in exercise of their power of sale as mortgagees and, in consequence, —

> "they only covenant against incumbrances. No covenant for title or any further covenant was expressed in the said conveyance or implied by law and the appellants say that in those circumstances the respondent is not entitled to the indemnity claimed or at all."

They also contested the actual amount claimed in the event of their being held liable to indemnify the respondent.

On 24th September, 1963, there was made in the cause an order of court against which there has been no appeal, and which was made —

> "Upon the abovenamed [appellants] consenting to judgment herein pursuant to Order 39 rule 11."

The order contained a declaratory order that the indenture of mortgage is "null and void", directed the registrar of deeds to cancel registration of this indenture and all references thereto, dismissed the appellants' counterclaim and ordered a stay of proceedings in the cause against the appellants insofar as the owner's

claim and the appellants' counterclaim were concerned.

On 16th April, 1964, there was a further order made in the cause against which also there has been no appeal and which was made —

"Upon the abovenamed [respondent] consenting to judgment herein pursuant to Order 39 rule 11."

This order contained a declaratory order that the indenture of conveyance is "null and void", a corresponding order directed to the registrar of deeds, and further orders against the respondent to hand over the title deeds and pay the nett rents collected by him to the owner.

Both these orders are, of course, orders by consent and no appearances are recorded in the formal orders. It is not clear from the record whether or not the respondent, who was of course a co-defendant, had any notice of the intention to apply for the first order and it is equally not clear whether the appellants had any notice of the intention to apply for the second order.

With the proceedings in this state, the cause came on for hearing on 14th April, 1964, when counsel for the owner referred to the two orders for consent, stated that the owner had no further interest in the proceedings and asked to be released. There is no record of any objection by either of the other two parties and this request was granted. The hearing proceeded as between the appellants and the respondent only on the question of the claim by the latter against the former. No evidence was called and the issue was apparently argued on a mutual acceptance of the facts as alleged in the pleadings and as set out earlier in this judgment.

The trial judge, observing that he was concerned only with the respondent's claim for the return of the purchase money on the ground of mutual fundamental mistake, held that the respondent was entitled to succeed on this ground if there had been a total failure of consideration, as he held there had been. He accordingly gave judgment in favour of the respondent for the full amount claimed, that is, the purchase price of $6,500 plus $187.75 for conveyancing costs.

From this judgment the appellants have appealed on a number of grounds which I do not find it necessary to set out in detail.

There is no doubt that both parties entered into this contract of sale under a mistake of a fundamental nature common to both and that there was in fact a total failure of consideration, which was not apparent because of the common mistake. The conveyance executed in pursuance of that contract, purports to convey the fee simple of the land in question to the respondent by virtue of the power of sale vested in the appellants under the supposed mortgage. Because of the circumstances which are now common knowledge, no such estate, indeed no estate or interest in the land at all, was conveyed by the conveyance to the respondent. The common fundamental mistake that formed the basis of the contract for sale, was that both parties thought the appellants had full right as mortgagees to convey the interest conveyed, whereas they had no right to convey anything. In ordinary circumstances, on these facts rescission of an executed contract (if asked for) and refund of the purchase price, would be ordered, especially as there appears to be no difficulty in restoring the parties to the position in which they both stood *vis-a-vis* one another immediately before the contract was concluded.

The appellants, however, contend that this should not be the result of these proceedings because:—

(1) this was a case of a sale by a mortgagee and therefore there were not the usual implied covenants for title, and

(2) under the conditions of sale, which were part of the contract, the purchaser accepted the risk that the power of attorney under which the mortgage to the appellants was executed, might not be valid and subsisting.

In support of the first point, it was submitted that examination of those cases in which rescission had been granted after a contract had been fully executed by conveyance, showed that they were cases where the normal covenants for title applied, and the relief was really based on that consideration. It may be true that, in some cases where the common fundamental mistake concerned a defect in the conveying party's title or right to convey, there may also be a remedy under a covenant for title, but examination of other cases shows that the principle of rescission on account of fundamental common mistake is not in any way dependant upon the existence of a remedy under a covenant for title. In *Solle* v. *Butcher*,[1] for instance, after execution of a sublease and occupation of the premises for some considerable time, the tenant sued to recover rent paid in excess of the standard rent calculated in accordance with the Rent Restriction Acts. The rent fixed by the lease was higher, because both landlord and tenant had concluded that the Acts did not apply and the original contract for a tenancy had been entered into by both parties on that basis. It was held that the Acts did apply, but the tenant failed in his claim and the landlord, on his counterclaim, was granted rescission on the ground of common mistake of a fundamental nature. Here the mistake had nothing to do with any covenant for title, and Denning L.J. expressed the principle at page 693 in these terms:—

"A contract is also liable in equity to be set aside if the parties were under a common misapprehension either as to facts or as to their relative and respective

rights, provided that the misapprehension was fundamental and that the party seeking to set it aside was not himself at fault."

It was contended that the two principal cases in which relief had been granted after conveyance, were really based on the fact that the conveying party was subject to usual covenants for title. These two cases, *Cooper* v. *Phibbs* [2] and *Bingham* v. *Bingham* [3] do not support this contention. Indeed, on analysis it appears that the decision was not so based. *Cooper* v. *Phibbs* [2] concerned, not a sale, but a lease, and accordingly the ordinary covenants for title as between vendor and purchaser were not applicable to the transaction. Assuming there was the usual covenant for quiet enjoyment, obviously the decision could not depend upon possible breach of a covenant providing only for the acts of persons lawfully claiming under the lessor, when the claim depended upon the fact that the latter had no title, and no right to possession, at all. In *Bingham* v. *Bingham*,[3] although the transaction was a sale, it was carried out by lease and release and it is not possible to state what covenants for title were involved. The brief report of the judgment, however, makes no reference to covenants for title, but does show that the decision was based on mistake.

The true position in the present case is that the contract was impossible to perform and there has been a complete failure of performance by the appellants. Condition 12 of the conditions of sale states that the appellants were selling as mortgagees. They contracted to convey an estate in fee simple in this land by virtue of their right to exercise their power of sale as mortgagees. This they could never do, and in fact they have never conveyed any interest in the land to the respondent.

Of course, an ordinary vendor may contract to sell an estate or interest in land that is not vested in him at the date he so contracts. Such a contract may not be impossible to perform, because he may afterwards acquire the interest, or there may be a conveyance by direction. It is contrary to commonsense, however, to hold that one who sells in purported exercise of a power of sale as mortgagee can fulfil his contract, made at a time when he held no mortgage at all, by putting himself, within the time limited for settlement, in a position to exercise such a power of sale and convey as a mortgagee. It is not inconceivable that, when the true position was discovered, by mutual agreement of all concerned, the land might still be conveyed to the purchaser, but that would be in pursuance of fresh contracts and not in fulfilment of the original contract.

The indenture of conveyance records that the appellants —

"as mortgagees in exercise of the said power of sale and all other powers (if any) them hereunto enabling *hereby convey* unto" —

the respondent the land concerned for an estate in fee simple. In fact, this indenture of conveyance did not convey any estate or interest at all to the respondent and it was (and remains) impossible for the appellants to perform their part of the contract.

Their obligation is not merely to be a party to a document called an indenture of conveyance purporting to convey an estate in fee simple. They undertake to convey that estate to the purchaser. That this is so in the case of contracts for the sale of land is shown by the fact that a vendor can fulfil his contract by means of a conveyance executed by someone else as owner. The purchaser is obtaining what the vendor contracted to deliver — an estate or interest in the land, not a document called an indenture of conveyance signed by the vendor. The two are as different as the peas and beans referred to by Lord Abinger in *Charter* v. *Hopkins*.[4] In my judgment, therefore, the appellants have completely failed to perform their part of the contract for sale.

This conclusion is quite independent of any question of restricted covenants for title. The appellants never could convey any estate or interest in this land as mortgagees or in any other capacity. The restricted covenant for title refers only to any defect in the title to the estate or interest conveyed by the mortgagees and frees them from any responsibility for any such defect that results from the acts of persons other than the mortgagees. It may not be a breach of that covenant if the conveyance is totally ineffective, but, in that event, the mere existence of this covenant does not prevent the application of that part of the law concerning common mistake leading to impossibility of performance and resulting in total failure of consideration. If the terms of the contract expressly excluded all covenants for title, express or implied, the position would still remain that, because of this common mistake, the appellants have failed to perform their part of the contract — to convey an interest in the land to the respondent. The indenture of conveyance was wholly ineffective to fulfil the appellants' fundamental obligation under the contract.

For the appellants great stress was laid on cases such as *Svanosio* v. *McNamara* [5] and *Clare* v. *Lamb*,[6] where the judgments draw attention to remedies usually available on the covenants for title. Those, however, were not cases of total failure of consideration. In the first case, there was partial failure of consideration only.

In *Clare* v. *Lamb* [6] the property was sold by the first mortgagee with the concurrence of

executors who it was thought owned the equity of redemption. Both the first and second mortgagees and the executors joined in the conveyance to the purchaser, the purchase money being distributed between them according to their respective rights and interests. The true owner of the equity of redemption subsequently brought proceedings to recover possession, but the court treated the purchaser as the assignee of the mortgagees and merely directed an account, so that the purchaser had to pay again the amount the executors had received from the purchase price. As the supposed owners of the equity of redemption had conveyed as executors without any covenant for title, the purchaser could not recover from them the part of the purchase price which the executors had received. In that case, a person having a right to sell the legal estate had done so and had subsequently conveyed the property, and the court did not upset that transaction. Consequently, there had not been total failure of consideration.

The present case falls within the class of cases illustrated by *Bingham* v. *Bingham* [3] and *Cooper* v. *Phibbs* [2] where the party conveying did not own the interest he purported to convey. In addition to contending that these cases were distinguishable because they were cases where the ordinary covenants for title existed (a point with which I have already dealt) it was further contended for the appellants that these cases depended upon the fact that the purchaser himself was the owner of the particular interest and that their effect should be confined to those circumstances. Nothing in the judgments suggests that this is so. Both judgments are expressly based upon the application of principles applicable to common mistake, as is shown from the following passage from the speech of Lord Cranworth in *Cooper* v. *Phibbs* [2] at page 164:—

> "The consequence was, that the present appellant, when, after the death of his uncle, he entered into the agreement to take a lease of this property, entered into an agreement to take a lease of what was, in truth, his own property — for, in truth, this fishery was bound by the covenant, and belonged to him, just as much as did the lands of *Ballysadare;* therefore, he says, I entered into the agreement under a common mistake, and I am entitled to be relieved from the consequence of it.
>
> In support of that proposition he relied upon a case which was decided in the time of Lord Hardwicke, not by Lord Hardwicke himself, but the then Master of the Rolls, *Bingham* v. *Bingham,* where that relief was expressly administered. I believe that the doctrine there acted upon was perfectly correct doctrine.".

The answer to the appellants' contention lies in the fact that the true principle to be applied is that of common mistake leading to impossibility of performance. A person contracting to buy his own property is only one example of such a mistake. A person agreeing to sell something he is never able to convey is another example, assuming in both cases that both parties have entered into the contract under a common mistake as to the true position.

In *Svanosio's* case,[5] McTierman J., Williams J. and Webb J., in a joint judgment, sum up *Cooper* v. *Phibbs* [2] and *Bingham's* case [3] as follows:—

> "But the proper principle appears to be that, in the case of a completed contract of sale, rescission is only possible on the ground of common mistake where, contrary to the belief of the parties, there is nothing to contract about, as in *Bingham* v. *Bingham* and *Cooper* v. *Phibbs.*"

I prefer the language used by Dixon C.J. and Fullagar J., in their joint judgment, at page 198, where they say —

> "In such cases a court of equity is not called upon to undo anything. The conveyance is simply devoid of legal effect, and, if it were not for the fact that adjustments and allowances will generally have to be made, one would think that the money paid could be recovered at law."

Some support for this view of those cases is to be obtained from the observation of Lord Atkin in *Bell* v. *Lever Bros. Ltd.*,[7] in commenting on the reasoning in *Cooper* v. *Phibbs*,[2] that —

> "Even where the vendor has no title, though both parties think he has, the correct view would appear to be that there is a contract; but that the vendor has either committed a breach of a stipulation as to title, or is not able to perform his contract."

In the present case, the first alternative does not apply, as the usual implied covenant with regard to right to convey is excluded from the contract, and from any effective conveyance entered into pursuant to the contract.

Some reliance was placed on the closing remarks of Lord Mansfield in his judgment in *Bree* v. *Holbech.*[8] It is to be observed, however, that this was a case heard in the Court of King's Bench on demurrer. The defendant had pleaded the statute of limitations and the claim could be taken out of the statute only if the pleadings contained an allegation of fraud. The whole judgment is directed to this point concerning the pleadings and is to the effect that the pleadings did not clearly allege fraud. In fact, the plaintiff was given leave to amend if, upon further enquiry, a charge of fraud could be supported. The closing remarks, therefore, were not only *obiter dicta,* but clearly made in circumstances which did not call for any consideration of the question whether there might be circumstances other than fraud in which a purchaser might have relief notwithstanding the general rule that it is incumbent on a purchaser to examine and check the title of his vendor in a conveyancing transaction.

That this remains a true case of impossibility of performance notwithstanding that an indenture of conveyance was completed, is shown by consideration of the position that would exist

if the mistake had been discovered before settlement. Obviously, the vendor could not have performed his contract and the remedies available to the parties would have been those available as on impossibility of performance due to common mistake on a fundamental matter. It cannot be suggested that such a contract has been removed from that category because the vendor has signed a document which is "devoid of legal effect" (to quote the words of Dixon C.J. and Fullagar J.) and which has in fact been declared null and void in proceedings to which the appellants and respondent were both parties.

Inasmuch as no effective conveyance has been completed, in my judgment the correct view of the legal position is that this contract is not yet executed insofar as concerns the consideration which should pass from the vendor to the purchaser. As I have observed before, that consideration was not a completed document, but an interest in land. Obviously it never can be executed in this respect and the parties remain in the same legal position as if these proceedings had come before the court before any conveyance had been completed. That position is that they are parties to a contract which it is impossible to perform.

For the appellants, it was suggested that this position was provided for in condition 11 of the conditions of sale, which reads as follows:—

> "The purchaser shall assume that every title deed which purports to have been executed by any party thereto by his attorney was in fact duly executed under a valid and subsisting power of attorney giving all necessary power to the attorney to execute the same."

It was, however, conceded that, if the true position had been discovered before settlement, this condition would not have led to specific performance of the contract being ordered as against the purchaser, or to judgment for the purchase price. Obviously, no court would make either of these orders which necessarily involves the court being privy to the vendor signing a document purporting to convey something which he has no right to convey. Condition 11 merely absolves the vendor from producing, on requisition or on settlement, evidence of the facts to be assumed, and it might absolve the vendor from a claim for damages in respect of loss or expense if, subsequent to settlement, some deficiency in title was discovered because some of those facts had been wrongly assumed to exist. It can never have been in the contemplation of the parties, when including condition 11 in the contract, that, if, due to such a wrong assumption, or for any other reason, it was impossible for the vendor to perform any part of his contract at all, the parties must still carry on and complete the necessary deeds and the purchaser must pay the purchase price and receive nothing in return.

From my conclusion that there has been a total failure of consideration due to a common mistake, it follows that the respondent is entitled to recover and it remains to consider exactly what sum he should receive.

The sale was advertised as a mortgagee's sale and it is beyond doubt that both parties contracted on the basis that a valid mortgage existed under which the vendor was then entitled to exercise his power of sale. In these circumstances, there can be no question of this being a case where the parties contracted on the basis that, if the vendor could not convey because no such mortgage existed, the vendor must still have an estate in fee simple conveyed to the purchaser, or be liable in law as for breach of contract. Nor is there any suggestion that the mistake was in any way the fault of the appellants. The whole basis of the transaction was that this mortgage and power of sale existed, and consequently the total failure of consideration in this case is solely due to a common mistake relating to a matter that was from the outset fundamental to the contract.

In those circumstances, the respondent is entitled to recover back the actual amount paid to the appellants on settlement. The claim is for the full purchase price ($6,500) but the amount paid on settlement was only $6,342.20 due to apportionment of outgoings which presumably the respondent had to pay. However, the order by consent declaring the indenture of conveyance void also includes an order that the respondent pay the balance in his hands of the nett rents collected by him and, if he paid outgoings in respect of the owner's property, they should have been taken into account on the latter's claim for an account of the rents. Consequently, the respondent should have judgment for only $6,342.20 in respect of purchase price paid. As, on the view that I have taken, the contract was impossible to perform due to common mistake, and not due to default on the part of the appellants, the respondent cannot recover his conveyancing costs.

In the result, I would dismiss this appeal with costs to the respondent, but substitute judgment for $6,342.20 instead of judgment for $6,687.75.

Barakbah C.J. (Malaya) concurred.

Tan Ah Tah F.J.: The plaintiff is the owner of a piece of land known as Lot 403 of Town Subdivision XVIII together with the premises erected thereon and known as Nos. 52 and 52A Kerbau Road, Singapore. For the sake of convenience the land and premises are hereinafter referred to as the property. The plaintiff became the owner of the property by virtue of a conveyance which was registered on the 21st August 1941.

The property was managed by one Syed

Abdulrahman bin Abdullah Alsagoff who was employed by the plaintiff as his agent. Acting under a power of attorney dated the 16th April 1958 which was alleged to have been executed by the plaintiff in favour of Syed Abdulrahman bin Abdullah Alsagoff, the latter by a mortgage dated the 3rd May 1960 purported to mortgage the property in favour of the first and second defendants as security for the repayment of a loan of $6,000. In purported exercise of their power of sale as mortgagees, the first and second defendants, by a conveyance dated the 30th June 1961, purported to sell and convey the property to the third defendant in consideration of a sum of $6,500 alleged to have been paid to them by the third defendant.

In fact, the plaintiff never executed the power of attorney in favour of Syed Abdulrahman bin Abdullah Alsagoff and never authorised him to mortgage the property. The power of attorney was nothing but a forgery. The plaintiff received no benefit whatsoever from either of the two transactions which have been described.

After the forgery had been discovered, the plaintiff brought an action in the High Court in Singapore asking for a declaration that both the mortgage dated the 3rd May 1960 and the conveyance dated the 30th June 1961 are null and void.

On the 20th September 1963 the first and second defendants consented to judgment in favour of the plaintiff. On the 24th September 1963 judgment by consent was accordingly entered declaring the mortgage dated the 3rd May 1960 null and void, directing the registrar of deeds, Singapore to cancel the registration of the mortgage and staying all further proceedings in the action between the plaintiff and the first and second defendants.

On the 9th April 1964 the third defendant consented to judgment in favour of the plaintiff. On the 16th April 1964 judgment by consent was accordingly entered declaring the conveyance dated the 30th June 1961 null and void, directing the registrar of deeds, Singapore, to cancel the registration of the conveyance and directing the third defendant to hand over to the plaintiff all the title deeds relating to the property.

The only issue therefore left to be tried before the court below was the third defendant's claim against the first and second defendants. This claim was for the sum of $6,500 and conveyancing costs amounting to $187.75 and was based on the ground that the conveyance dated the 30th June 1961 was null and void and that there was a total failure of consideration for the sum of $6,500 alleged to have been paid by the third defendant to the first and second defendants as the purchase price of the property. In the alternative, the third defendant contended that if the conveyance was not wholly void, it was voidable or liable to be set aside on the ground of fundamental mistake of all parties thereto.

In the result, the learned trial judge held that the third defendant was entitled to recover from the first and second defendants the whole of the purchase-money as well as the conveyancing costs which he had paid. Judgment was accordingly entered for the third defendant against the first and second defendants for the sum of $6,687.75 with costs. It is against this judgment that this appeal is brought by the first and second defendants.

In the conveyance dated the 30th June 1961 the first and second defendants were expressed to convey as mortgagees. By virtue of section 7(1)(F) of the Conveyancing and Law of Property Ordinance (Cap. 243), the only covenant to be implied on the part of the first and second defendants is to the following effect:—

> "That the person so conveying has not executed or done, or knowingly suffered, or been party or privy to, any deed or thing, whereby or by means whereof the subject matter of the conveyance, or any part thereof, is or may be impeached, charged, affected or incumbered in title, estate or otherwise, or whereby or by means whereof the person who so conveys is in anywise hindered from conveying the subject matter of the conveyance, or any part thereof, in the manner in which it is expressed to be conveyed."

The transaction was the result of a sale by auction and the sale was subject to certain special conditions. Clauses 11 and 12 of the special conditions read as follows:—

> "11. The purchaser shall assume that every title deed which purports to have been executed by any party thereto by his attorney was in fact duly executed under a valid and subsisting power of attorney giving all necessary power to the attorney to execute the same."

> "12. The vendor is selling as mortgagee and the concurrence of any person or persons interested in the properties shall not be required nor shall the vendor be required to enter into any covenant for title other than the implied statutory covenant against incumbrances."

It is not disputed that the first and second defendants were totally unaware of the fact that the power of attorney dated the 16th April 1958 was a forgery. There is no suggestion of any fraudulent conduct on their part. It is clear that when the first and second defendants as the so-called mortgagees and the third defendant as the so-called purchaser entered into the transaction they did so under a common mistake. This common mistake arose out of the assumption or belief that the first and second defendants were in fact mortgagees and were conveying the property in exercise of their power of sale as mortgagees. The true position of course was that the property had never been mortgaged to the first and second defendants and they had no right whatsoever to deal with the property.

In my view this case must be dealt with on the basis that there has been a common mistake of a fundamental character which has resulted in a total failure of consideration. In this connection it is relevant to refer to the judgments in the case of *Svanosio* v. *McNamara*,[5] which was heard by the High Court of Australia. In their joint judgment, Dixon C.J. and Fullagar J. said, at page 198:—

"With regard to transactions relating to land, equitable relief after conveyance was granted in *Bingham* v. *Bingham; Hitchcock* v. *Giddings; Cooper* v. *Phibbs*, and *Hart* v. *Swaine*. In every case of this type, however, which has been found, the position simply was that the vendor had no title at all to the property sold. In *Bingham* v. *Bingham* the land was actually the property of the purchaser himself. In such cases a court of equity is not called upon to undo anything. The conveyance is simply devoid of legal effect, and, if it were not for the fact that adjustments and allowances will generally have to be made, one would think that the money paid could be recovered at law. Apart from this very special type of case, it is clearly established that equity will not undo a sale of land after conveyance unless there has been fraud or there is such a discrepancy between what has been sold and what has been conveyed that there is a total failure of consideration, or what amounts practically to a total failure of consideration."

In the same case, McTiernan J., Williams J. and Webb J., in a joint judgment, made the following observations, at pages 207 and 209:—

"It may be possible in exceptional cases to obtain relief on the ground of common mistake after a contract for the sale of land has been completed. But the cases must be very rare. They are unlikely to go beyond cases where there has been a total failure of consideration. One case is where it is found, after completion, that the purchaser and not the vendor is the owner of the land so that the purchaser is really paying for his own property. In *Bingham* v. *Bingham* the plaintiff had contracted to purchase land from the defendant, to which the defendant had no title although he believed that he had, which was the property of the plaintiff. The defendant conveyed the land to the plaintiff by deed of lease and re-lease. It was contended that it was the plaintiff's own fault as the title deeds had been produced to him and he had had time to examine the title and the maxim *caveat emptor* applied. But it was held that there was a plain mistake and a court would not suffer the defendant to run away with the money in consideration of the sale of an estate to which he had no right. This was a case where the mistake was so fundamental that there was a total failure of consideration. The plaintiff had paid to the defendant the purchase money for land which was the property of the plaintiff. In *Cooper* v. *Phibbs* there was also a total failure of consideration. The plaintiff had agreed to lease a fishery of which he was, unknown to him, the tenant for life from the defendant who had no title at all to the property."

"But the proper principle appears to be that, in the case of a completed contract of sale, rescission is only possible on the ground of common mistake where, contrary to the belief of the parties, there is nothing to contract about as in *Bingham* v. *Bingham* and *Cooper* v. *Phibbs*."

Counsel for the first and second defendants laid much emphasis on the fact that the conveyance had been executed and the contract for sale completed. On this point it is, in my view, pertinent to observe that the so-called conveyance was a useless piece of paper and that in fact nothing had been sold to the third defendant. Counsel for the first and second defendants further submitted that his clients had not given the usual vendor's covenants for title, the only covenant impliedly given by them being the one under section 7(1)(F) of the Conveyancing and Law of Property Ordinance (Cap. 243) to which reference has already been made. It was also submitted by counsel for the first and second defendants that the maxim *caveat emptor* applied to this case. He pointed out that under clause 11 of the special conditions of sale the third defendant was put on enquiry as to the validity of the power of attorney and the due execution of title deeds.

In my opinion, these submissions and arguments do not in any way assist the first and second defendants, the reason being that they are not relevant in this case where there has been a common mistake of a fundamental character which has resulted in a total failure of consideration.

Counsel for the first and second defendants also placed great reliance on the case of *Clare* v. *Lamb*.[6] In this case, a first mortgagee put certain property up for sale by public auction. This was done with the concurrence of executors who were thought to own the equity of redemption. The conveyance in favour of the purchaser was executed by the first and second mortgagees and the executors and the purchase-money was distributed among them according to what was thought to be their respective rights and interests. When the true owner of the equity of redemption discovered that she had an interest in the property, she sued the purchaser in order to recover possession. The court in its decree treated the purchaser as the assignee of the mortgagees and directed an account to be taken. The result was that the purchaser had to pay again the amount the executors had received out of the purchase price. As the executors had conveyed without any covenant for title, the purchaser could not recover from them that part of the purchase price which the executors had received. It is clear that in that case a person who had the right to sell the legal estate had done so by executing a conveyance, in which other parties had joined. The case therefore cannot be treated as one where there has been a total failure of consideration. In his judgment Grove J. stated what he referred to as the general doctrine in the following words, at page 339:—

"When the conveyance has been executed, all that the purchaser has to look to is the liability of the vendor under the deed. If it contains no covenant for title, the purchaser takes what the vendor gives him, or, rather, what he is able upon his title to give him, and the vendor will only be responsible for his own acts and incumbrances. Such I believe to be the general doctrine."

In my opinion, this general doctrine cannot

be applied to a case such as the present one in which there has been a common mistake of a fundamental character which has resulted in a total failure of consideration.

It was contended by counsel for the first and second defendants that the purchaser in the case of a completed contract for sale of land, where there has been no fraud, can recover the purchase-money only in two types of cases, the first being where the property is non-existent and the second being where the purchaser is in fact the owner of the property. In none of the decided cases has this proposition been laid down. On the contrary, the proposition runs counter to the passages in the judgments in the case of *Svanosio* v. *McNamara, supra,* to which I have referred and which I respectfully adopt. There is no logical reason why cases of common mistakes of the sort under consideration should be confined to the two types of cases described by counsel. In my opinion, these two types of cases are merely examples of common mistakes of a fundamental character which have resulted in a total failure of consideration.

It follows from the foregoing that, in my judgment, the third defendant is entitled to recover the sum actually paid by him to the first and second defendants. This was the sum of $6,342.20, after apportionment of assessments and property tax. As it was impossible to perform the contract owing to the common mistake to which I have referred, and as the first and second defendants cannot be held to be responsible for it, the third defendant cannot recover the conveyancing costs which were paid by him to his own solicitors.

For the reasons which I have stated, I would dismiss this appeal with costs but would vary the judgment of the court below by substituting the sum of $6,342.20 for the sum of $6,687.75.

Appeal dismissed.

Solicitors: *Eber & Tan; Hilborne & Co.*

RE LOIS THERESA KAO
Ex parte THE OFFICIAL ASSIGNEE

[O.Bk.J. (Choor Singh J.) August 3, 1965]
[Singapore — In Bankruptcy No. 226 of 1963]

Bankruptcy — Conveyance by bankrupt — Application by official assignee to declare conveyance void — Good faith — Fraud — Bankruptcy Ordinance (Cap. 11), ss. 51 and 52.

Conveyancing — Conveyance by bankrupt — Valuable consideration — Good faith.

The official assignee applied for an order to declare a conveyance of property by a bankrupt void as against the official assignee and for an order to set it aside. The grounds on which the official assignee relied were: (a) the conveyance was not made in good faith or for valuable consideration and therefore void under section 51 of the Bankruptcy Ordinance; (b) the conveyance was an act of bankruptcy because it was a fraudulent conveyance; (c) the conveyance was fraudulent and void under section 52 of the Bankruptcy Ordinance.

Held: (1) the conveyance in this case was made for valuable consideration and in good faith and was therefore not void against the official assignee under section 51 of the Bankruptcy Ordinance;

(2) the conveyance was not an act of bankruptcy because it was not made fraudulently;

(3) the property was not conveyed in satisfaction of any debt due to the vendor and therefore section 52 of the Bankruptcy Ordinance had no application to the case.

Cases referred to:—

(1) *Re Yeow Heap Seng* [1965] 2 M.L.J. 67.

(2) *Re Anson Cycle & Motor Works* [1960] M.L.J 171.

(3) *In re Tetley* 3 Manson 226 at p. 235.

(4) *Copis* v. *Middleton* (1818), 2 Mad. 430.

(5) *Eastwood* v. *Brown* (1825), Ry. & Mood. 312.

(6) *Shears* v. *Goddard* [1896] 1 Q.B. 406.

BANKRUPTCY.

K. S. Chung for the official assignee.

Yin Ee Kheng for the respondent.

R. C. H. Lim for Chung Khiaw Bank.

Cur. Adv. Vult.

Choor Singh J.: This was a motion on behalf of the official assignee for an order declaring that the conveyance dated the 21st August 1963 and made between the abovenamed bankrupt Lois Theresa Kao as vendor and Leong Lai Peng as purchaser of house No. 15 Frankel Avenue, Singapore, was void against the official assignee, and for an order that it may be set aside. The grounds on which the motion was based were:—

(1) the conveyance was not made in good faith or for valuable consideration;

(2) the conveyance was an act of bankruptcy because it was fraudulent; and Lois Theresa Kao's bankruptcy related back to it, and her property divisible among her creditors included the said house; and, alternatively

(3) that the conveyance was fraudulent and void against the official assignee.

The bankrupt is a spinster and is 47 years of age. She was born in China and came to Singapore in 1940. She has been here ever since. Although she has written a book on cookery and another in the Hokkien dialect she has earned a living mainly by giving tuition in Chinese dialects and by doing translations for advertising firms. In or about the year 1957 she became interested in business and became a partner in a number of business ventures with varying degrees of success. Ultimately all these enterprises failed with the result that she was adjudged a bankrupt on the 17th January 1964 with liabilities amounting to $174,255 due to